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IN THE

Supreme Court of the United States

October Term, 1971.

No. 70-75.

MOOSE LODGE NO. 107,

Appellant,

v.

K. LEROY IRVIS, et al.

On Appeal From the United States District Court for the Middle District of Pennsylvania.

SUPPLEMENTAL BRIEF OF APPELLEE, K. LEROY IRVIS.

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Appellee, K. Leroy Irvis, files this supplemental brief, pursuant to Rule 41(5), to present to the Court late authorities not available in time to have been included in his brief in chief.

1. In *Pitts v. Wisconsin Department of Revenue*, 333 F. Supp. 662 (E. D. Wis. 1971), a three-judge district court considered a challenge to Wisconsin state statutes which granted exemptions from property and income taxes to various organizations. The complainants alleged that these statutes violated the Fourteenth Amendment insofar as they extended exemptions to organizations which discriminated in membership on racial grounds.

The District Court concluded that the complainants were entitled to injunctive relief forbidding the grant of tax exemption to such organizations. It determined that a proper cause of action had been alleged under 28 U. S. C. § 1343 and 42 U. S. C. § 1983, that an actual case or controversy presenting a justiciable issue existed and that complainants' rights under the Fourteenth Amendment had been violated by the State's grant of tax exemptions.

2. Even more significant is *McGlotten v. Connally*, decided by a three-judge district court for the District of Columbia on January 11, 1972 (Civil Action No. 3377-70). McGlotten, a Negro, sought to enjoin the Secretary of the Treasury from granting tax benefits under the Internal Revenue Code to fraternal and nonprofit organizations which discriminated against nonwhites. The Court's opinion provides virtually a mirror image of the present case.

First, the Court found that the case was properly brought before a three-judge court because McGlotten, like Irvis, had made a substantial attack on the constitutionality of a statute even though McGlotten, unlike Irvis, also had alleged unauthorized administrative action under the statute. The Court found both *Zemel v. Rusk*, 381 U. S. 1, and *Flast v. Cohen*, 392 U. S. 83, dispositive of the issue.

Second, rejecting the Government's claim that McGlotten lacked standing, the Court held that a black American has standing to challenge a system of governmental support and encouragement of segregation through a network of tax benefits. As Irvis has asserted in his brief in chief (pp. 34-43), he should be afforded a similar right to challenge a system of governmental support and encouragement of segregation through a network of licensing which produces economic benefits to the discriminating organization.

Third, on the merits the Court concluded that various provisions of the Internal Revenue Code involve the Federal Government in forbidden "state action" in support of racial discrimination. Sections 170(c)(4), 642(c), 2055, 2106(a) and 2522 authorize deductions for contributions to discriminating fraternal orders. Each of these provisions involve the Government in various ways in the affairs of the organization and thus violate Constitutional prohibitions.

Sections 501(c)(7) and 501(c)(8) grant exemptions from income tax to nonprofit clubs and to fraternal orders respectively. The Court found no invalidity in § 501(c)(7) because its reach extended only to the elimination from tax of the income received by nonprofit clubs from its members and, therefore, constituted not a special monetary benefit but rather a policy decision not to tax funds passed by a member to his club. Section 501(c)(8), however, allows a fraternal order to be free from tax also on its investment income; and this, held the Court, was a government-provided benefit in support of discrimination. Like Pennsylvania's grant of a liquor license to discriminating private clubs, the Federal Government thus involved itself in a forbidden way with private racial discrimination.

The *McGlotten* opinion reaches the heart of the issue.

"The minds and hearts of men may be beyond the purview of this or any other court; perhaps those who cling to infantile and ultimately self-destructive notions of their racial superiority cannot be forced to maturity. But the Fifth and Fourteenth Amendments do require that such individuals not be given solace in their delusions by the Government."

Respectfully submitted,

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February, 1972.